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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GRACE CHANG,

Petitioner,

v.

THE SUPERIOR COURT OF LOS
ANGELES COUNTY,

Respondent;

ILENE BURROS,

Real Party in Interest.

No. B238624

(Super. Ct. No. BC448976)

ORIGINAL PROCEEDING: Petition for Writ of Mandate. Michelle
R. Rosenblatt, Judge. Petition Granted.

The Boesch Law Group and Benjamin C. Johnson for Petitioner.

No appearance on behalf of Respondent.

Bistline Cohoon & Luymes, Ted H. Luymes and James B. Cohoon for Real Party
in Interest.

I. INTRODUCTION

After a defendant uses a Code of Civil Procedure¹ section 170.6 challenge, a subsequently added codefendant may use a timely filed section 170.6 challenge only if the added codefendant shows that the codefendant's interests are substantially adverse to the interests of the party that previously exercised the challenge. (*The Home Ins. Co. v. Superior Court* (2005) 34 Cal.4th 1025, 1035.) In this case, a codefendant added to the case was granted a section 170.6 challenge without making this requisite showing.

Accordingly, we grant the petition for writ of mandate because the trial court accepted a codefendant's section 170.6 challenge despite the absence of evidence that the codefendant's interests were substantially adverse to those of the defendant that exercised the previous challenge.

II. PROCEDURAL HISTORY

The relevant procedural history is not disputed. On November 5, 2010, petitioner Grace J. Chang filed a lawsuit against five defendants as well as Doe defendants 1 through 20. On April 8, 2011, four of the defendants named in the complaint filed a cross-complaint against CPS Security Solution, Inc.² On May 24, 2011, CPS filed a section 170.6 challenge which was accepted by the trial court. The case was transferred to another judge.

On November 10, 2011, Chang amended the complaint such that Does 1 through 4 were identified as defendants Adelino Souza, Ilene Burros, CPS, and Rogelio B. Guiang respectively.

On December 22, 2011, the trial court held a hearing on petitioner's motion to quash deposition subpoenas issued by one of the original defendants. The court

¹ All further statutory references are to the Code of Civil Procedure.

² This cross-defendant was doing business as Commercial Protective Services, Inc. and is hereafter referred to as "CPS."

tentatively granted the motion and indicated it intended to award monetary sanctions against the defense. However, the trial court continued the hearing to January 27, 2012, in order to allow the defendant an opportunity to provide additional evidence supporting the issuance of the subpoenas.

Burros filed her answer to the complaint as well as a section 170.6 challenge. On January 3, 2012, the challenge was accepted and the case was ordered transferred to another court for reassignment to a third judge.

We issued an alternative writ of mandate directing the trial court to confer with the parties and either: (a) vacate the order granting the second section 170.6 challenge; or (b) show cause why a preemptory writ should not issue. The trial court conferred with the parties and issued an order indicating as follows: “[Burros] requests an opportunity to submit evidence and litigate the issue of whether the parties are ‘substantially adverse’ to one another. Therefore, the [c]ourt is not exercising option (a) . . . and will await further instructions from the Court of Appeal”

III. DISCUSSION

“Section 170.6 permits a party to obtain the disqualification of a judge for prejudice, based solely upon a sworn statement, without being required to establish prejudice as a matter of fact to the satisfaction of the court.” (*The Home Ins. Co. v. Superior Court, supra*, 34 Cal.4th at p. 1032.) However, “[N]o party or attorney shall be permitted to make more than one such motion in any one action or special proceeding pursuant to this section. In actions . . . where there may be more than one plaintiff or . . . more than one defendant . . . appearing in the action . . . , only one motion for each side may be made in any one action or special proceeding.” (§ 170.6, subd. (a)(4).)

“[C]ases [have] uniformly . . . recognized that the party seeking a subsequent disqualification of the trial judge has the burden of demonstrating that its interests are substantially adverse to those of a coparty that previously exercised a preemptory challenge—substantially adverse interests are not presumed.” (*The Home Ins. Co. v.*

Superior Court, supra, 34 Cal.4th at p. 1035.) Here, Burros failed to make this necessary showing. Indeed, the trial court acknowledges as much in its order by indicating Burros now wants an “opportunity” to present such evidence. Given the record, we have no choice but to grant the petition for writ of mandate.³

IV. DISPOSITION

The petition is granted. The superior court is directed to vacate its order of January 3, 2012, granting Burros’s motion made pursuant to Code of Civil Procedure section 170.6 and enter a new order denying the motion. Each party is to bear its own costs.

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KUMAR, J.*

We concur:

TURNER, P. J.

MOSK, J.

³ The December 22, 2011 hearing did not bar a subsequent section 170.6 motion. (See § 170.6, subd. (a)(2) [(“The fact that a judge, . . . has presided at, or acted in connection with, a pretrial . . . hearing, proceeding, or motion prior to trial and not involving a determination of contested fact issues relating to the merits, shall not preclude the later making of the motion . . .”).])

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.